

On appeal, claimant, in her application for review, requests the Appeals Board to review the issue of whether claimant suffered an accidental injury that arose out of and in the course of her employment with respondent. The claimant failed to file a brief in this matter as requested. Therefore, the Appeals Board does not have the benefit of claimant's arguments and contentions concerning this issue.

Respondent, on the other hand, requests the Appeals Board to affirm the ALJ's Order Denying Compensation. Respondent contends claimant's testimony was inconsistent and was not credible.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments contained in the respondent's brief, the Appeals Board concludes the ALJ's Order Denying Compensation should be affirmed.

Claimant alleges she injured her low back while working for the respondent on June 18, 19, and 20, 1999. But she describes only a specific accident that occurred on June 18, 1999, when she lifted dry laundry into a washing machine. Claimant testified she notified respondent's motel manager, after the accident, that she had injured her low back and requested medical treatment. Claimant testified that the motel manager refused to refer her for medical treatment.

At one point during claimant's preliminary hearing testimony, she testified that she sought medical treatment on her own at St. Francis Hospital in Topeka, Kansas. She indicated that she received emergency medical treatment on either June 18, 1999, or June 19, 1999. Then later in the preliminary hearing proceedings, claimant changed her story and testified she received medical treatment at St. Francis Hospital for another alleged injury that she suffered while working for respondent in February 1999.

After the alleged June 18, 1999, injury, claimant testified she did not return to work the next day, June 19, 1999, but did return on June 20, 1999. But at the time claimant returned to work on June 20, 1999, respondent terminated her. As previously noted above, claimant alleged she was injured while working during the full three-day period of June 18, 19, and 20, 1999. But she testified her injury occurred only as a result of one single event, lifting dry laundry, on June 18, 1999, and she did not work on either June 19 or June 20, 1999.

After respondent terminated claimant, she contacted her present attorney who then sent her for evaluation treatment to Gary L. Counselman, D.C. Dr. Counselman first saw claimant on June 22, 1999. At Dr. Counselman's request, claimant completed a New Patient Information sheet. Contained in the information sheet was claimant's description of her accident at work on June 18, 1999, as occurring "bending to pick up wet laundry." In contrast, claimant had earlier testified in the preliminary hearing that the accident occurred as she was picking up dry laundry instead of wet laundry. Claimant also filled out a Workmen's Compensation Questionnaire for Dr. Counselman which indicated that the accident had occurred on June 18, 1999, at 12:00 a.m. instead of claimant's earlier testimony that the accident had occurred in the morning during her 9 a.m. to 3 p.m. work shift.

Dr. Counselman's medical treatment records were admitted into the preliminary hearing record. Those records indicated Dr. Counselman treated claimant at least through June 21, 2000. Dr. Counselman's treatment consisted of specific adjustments to claimant's low back, electrical myostimulation therapy, and mechanical traction.

Claimant testified she had not been employed since her last day worked for respondent on June 18, 1999, except for the period from approximately February 2000 through May 1, 2000, when she worked at a sedentary job for the State's Department of Revenue. But Dr. Counselman's records indicate that claimant started working for a nursing home in July 1999 as a dietary aide. When confronted with this information at the preliminary hearing, claimant admitted she was employed by the nursing home from July 1999 through January 22, 2000. She was terminated on January 23, 2000, not because of her low back problems, but because she did not come to work on her birthday.

Before claimant's alleged June 18, 1999 accident, claimant had previously suffered a low back injury while working for another employer sometime in the early 1990's. Claimant was treated for this low back condition by orthopedic surgeon Michael J. Schmidt, M.D. On August 19, 1994, Dr. Schmidt performed a laminectomy at the L4-5 vertebrae level. Dr. Schmidt's medical billing records were admitted into the preliminary hearing record and indicate that claimant saw Dr. Schmidt for low back pain at least through September 26, 1995.

The ALJ denied claimant's request for preliminary hearing benefits because he simply did not believe claimant. As noted above, claimant's testimony at the preliminary hearing was inconsistent with the medical records and questionnaires admitted into the preliminary hearing record. Additionally, claimant simply was untruthful when she claimed she was disabled from working from July 1999 through January 22, 2000, when she was gainfully employed as a dietary aide at a nursing home.

The Appeals Board concludes, as did the ALJ, that based on claimant's inconsistent and untruthful testimony, claimant cannot be believed that she injured her low back while working for the respondent.

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing of the claim.<sup>1</sup>

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order Denying Compensation entered by Administrative Law Judge Brad E. Avery on August 31, 2000, should be, and the same is hereby, affirmed in all respects.

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<sup>1</sup> See K.S.A. 1998 Supp. 44-534a(a)(2).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 2000.

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BOARD MEMBER

c: E. J. Schumacher, Topeka, KS  
Michael J. Haight, Overland Park, KS  
Brad E. Avery, Administrative Law Judge  
Philip S. Harness, Director